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IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1982

GREGORY SHELDON EWING,

KENT PATRICK EWING, PETITIONERS

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Government must have probable cause, or some other expressed standard, to initiate a criminal investigation on specific individuals, previously unknown to law enforcement.

2. Whether, if it is determined some standard is required to initiate a criminal investigation, having telephoned or been telephoned by known narcotic dealers meets such a standard.

3. Whether an in camera review of a declaration submitted by the informant, without the informant being present so he may be observed and his veracity questioned, satisfies the requirements in conducting a

balancing test as stated in Roviaro vs. Unites States.

All of the parties in the United States Court of Appeals for the Ninth Circuit are listed in the caption.

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OPINIONS BELOW

Ninth Circuit: The opinion of the Court of Appeals (Appendix A, infra, pages 1a) was not reported.

District Court: The oral opinion of the District Court denying Petitions' Motion to Disclose the Identity of the Informant (Appendix B, infra, pages 3a) was not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, infra, pages 1a) was entered on October 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment of the United States Constitution provides in relevent part:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure, shall not be violated...."

2. Title 21 of the United States Code, Section 841(a)(1), provides in relevant part:

> "...[It] shall be unlawful for any person knowingly or intentionally - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;..."

3. Title 21 , of the United States Code, Section 846 provides in relevant part:

> "Any person who attempts or conspires to commit any offense defined in this Title..., the Commission of which was the object of the attempt or conspiracy."

4. Title 18 of the United States Code, Section 2 (a) provides in a relevant part:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

STATEMENT

Petitioners, who are brothers, were the source of investigation by the Federal Bureau of Investigation and the Drug Enforcement Agency for alleged involvement in narcotics transactions. The investigation was initiated by the Government because Petitioners were listed in NADDIS, which indicated that Petitioners had called the telephone numbers of and/or had been called from the telephone numbers of several known narcotics dealers. (Appendix C pages 5a)

The Government utilized the assistance of an informant who telephoned Petitioners, at home, on at least six different occasions in an attempt to arrange a meeting between

Petitioners and an undercover DEA agent. The persistence of the calls lead to a meeting between one of the Petitioners, a DEA agent, and the informant, on or about September 25, 1981.

The sale of two kilograms of cocaine took place over one month later on October 29, 1981, which led to the arrest and conviction of Petitioners.

A Federal Grand Jury for the Central District of California returned a five count indictment charging the Petitioners with violations of Federal Narcotic laws.

Among other things, Petitioners filed a motion for disclosure of the government informant to substantiate and develop an entrapment defense and also reasonable cause to initiate and continue the investigation. After conducting an in camera inspection of the declaration of the informant without the informant or Defendants' counsel present,

and upon oral testimony and arguments at the motion hearing in which the Government failed to express the justification for its opposition to disclosure of the informant's identity, the motion was denied.

In this regard, the District Court stated in pertinent part (Appendix B, infra, pages 3a):

> "...[On] balance it appears to me that the public interest does take precedence over your need to know, because in looking at these items I can make the determination, at least, that there is no basis for your having them, that your defense would not be aided.
> However, the interest of the Government in protecting its informantsor those who provide it with information would be severely harmed."

Petitioners trial commenced on stipulated facts and Petitioners were found guilty as charged on all counts.

On Appeal to the Ninth Circuit the Petitioners raised the issue of the refusal to disclose the confidential informant and the lack of probable cause to initiate and actively investigate the Petitioners. The Court of Appeals affirmed the convictions stating in pertinent part (Appendix A, infra, pages 1a):

> 1. The Defendants were not entitled to the identity of the informant. United States vs. Marshall, 526 F.2d 1349 (9th Circuit), cert. denied, 426 U.S. 923 (1975).
>
> 2. Defendants have offered no authority for their contention that the Government must have probable cause to initiate a criminal investigation, and we reject the

proposition. We note, however, that the reason the Government began its investigation of the Ewings was that special agent Scotti had information that the Ewings had been involved in narcotics transactions. Certiorari is therefore sought to review the affirmations of the Petitioners' convictions.

REASONS FOR GRANTING THE WRIT

This case presents an issue of first impression and of exceptional importance. To Petitioners' knowledge, no Court has ever ruled on the issue as to whether there should be some standard, be it probable cause reasonable suspicion, or otherwise, to initiate a criminal investigation upon a particular individual.

The second issue, regarding the lower court's decision to conduct a balancing test as to the disclosure of a confidential informant as outlined in Roviaro vs. United States, by the declarations of the informant rather than his personal attendance, conflicts and is inconsistent wih the decisions of this Court and other Courts of Appeals.

I

WHETHER THE GOVERNMENT MUST HAVE PROBABLE CAUSE, OR SOME OTHER EXPRESSED STANDARD, TO INITIATE A CRIMINAL INVESTIGATION ON SPECIFIC INDIVIDUALS, PREVIOUSLY UNKNOWN TO LAW ENFORCEMENT.

The Fourth Amendment to the United States Constitution provides in relevant part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure, shall not be violated...."

The Fourth Amendment protects reasonable expectations of privacy. Its purpose, among others, is to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. United States vs. Martinez - Fuerte 428 U.S. 543, 554 (1976).

The right of privacy has been described as the right to be left alone. Katz vs. United States 389 U.S. 347 (1967).

At present there is no articulate standard that law enforcement must follow when it selects an individual as its next focus of investigation. All individuals, known or unknown, law abiding or harden

criminals are subject to the ears and eyes of the Government with nothing more than a random selection as a standard.

There exists probable cause for arrest: Brienegar vs. United States 338 U.S. 160, 175 - 76 (1949); probable cause for a search: Zurcher vs. Standford 436 U.S. 547, 558 (1978); reasonable suspicion of criminal activity for any investigatory stop: Terry vs. Ohio 392 U.S. 1 (1968); reasonable belief of armed and dangerous for a pat down of a person for weapons: Ybarra vs. Illinois 444 U.S. 85, 92 - 93 (1979), in addition to other pre-trial standards.

Currently, law enforcement can initiate an investigation of anyone, be it by focusing in on those who call a "suspicious" telephone number, or any other commonplace act.

Presumably, the only impediment preventing law enforcement from potentially

investigating everyone is a lack of money and manpower to do so. Therefore a State, County, or City with more revenue per capita can subject its citzens to more surveilance, investigation and widespread suspicion. Although the lower court believes there is always a first time to engage willfully in criminal conduct, Silva vs. United States 212 F.2d 422, 424 (9th Circuit 1954), we are all subject to an intrusive investigation and surveilance without some standard to guide law enforcement.

Petitioners claim to notoriety and the initiation of an investigation thereof focuses on their listing in NADDIS, which indicated the calling or being called by known narcotic dealers. Whether Petitioners knew of the activity of their callers apparently is not relevant. It is not what Petitioners knew, or said, or did, or even who they spoke to that led to the initiation

of an investigation that led to their arrest and conviction, but what telephone number Petitioners dialed.

The existence of an impact that is far reaching is clear. Not only are privacy rights violated, but freedom of association, including political activities, may be chilled for fear of calling an affiliation considered worthy of investigative infiltration. Still further, initiating an investigaion without some reasonable standard can jeopardize freedom of the press by subjecting reporters to the disclosure of their sources.

This should not appear too farfetched in light of the Court's ruling that pen registers do not constitute a search, and thus are not protected by the Fourth Amendment. Smith vs. State of Maryland 442 U.S. 735 (1979), thus, leaving us all open to an investigation whether we

knowingly or unknowingly phone a telephone number of an individual suspected of illegal activity. Or even worse, being called from a telephone number of a trailed suspect and thus becoming an unknown and unwilling suspect by mere passive conduct. The enormous impact on the citizenry of this Country and the potential for abuse is ominous.

To allow no standard in this area appears to be inconsistent with or stops short of the decisions of this Court that the mere proximity of a person to areas with a high incidence of drug activity or to persons to be known drug addicts does not provide the probable cause for a search or even reasonable suspicion for a stop. Ybarra vs. Illinois 444 U.S. 85 (1979); also Sibron vs. New York 392 U.S. 40 (1968).

"The inference that persons who talk to narcotic addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon the individual's personal security." Sibron vs. New York 392 U.S. 40, 62 (1968).

The choice is between individual privacy and integrity and governmental investigation and convenience. The framers were steadfast in choosing the individual over the State.

II

WHETHER AN IN CAMERA REVIEW OF A DECLARATION SUBMITTED BY THE INFORMANT, WITHOUT THE INFORMANT BEING PRESENT SO HE MAY BE OBSERVED AND HIS VERACITY QUESTIONED, SATISFIES THE REQUIREMENTS IN CONDUCTING A BALANCING TEST AS STATED IN ROVIARO VS. UNITED STATES.

The decision of the District Court

and the Court of Appeals is inconsistent with a host of other Appellate decisions and an extension of its own prior decisions in allowing an in camera inspection of an informant's declarations, and not his personal testimony, to conduct the balancing test regarding the disclosure of the confidential informant as outlined in Roviaro v. United States 353 US 53 (1957).

Thus in United States vs. Rawlinson 487 F.2d 5 (9th Cir. 1973), and United States vs.. Anderson 509 F.2d 724 (9th Cir. 1975), cert. denied, 420 U.S. 910 (1975); the Court permitted an in camera hearing closed to the Defendant and his attorney to explore the foundations of an informant's information and whether disclosure was necessary.

The in camera hearing has also been approved of and utilized in the Fifth Circuit - United States vs. Fischer 531 F.2d

783 (5th Cir. 1976); the Third Circuit in United States vs. Jackson 384 F.2d 825 (3rd Cir. 1967), cert. denied 392 U.S. 932 (1968); the Sixth Circuit in United States vs. Lloyd 400 F.2d 414 (6th Cir. 1968); and in the Eight Circuit in United States vs. Hurse 453 F.2d 128 (8th Cir. 1972). No circuit has disapproved of this procedure.

The lower court's ruling denying disclosure of the informant after conducting a balancing test was based upon the declaration of the informant. Petitioners contend that a declaration is insufficient surety to conduct a balancing test as to whether revealing the identity of the

A mere declaration of the informant submitted in camera is made without fear of cross-examination, without fear of contradiction, without fear of scrutiny, and without fear of challenge. The informant is allowed to state and relate anything,

about anybody, however damning, without fear of being subjected to a system of checks and balances. Not only is the content of said declaration suspect but the atmosphere in which the declaration was made is unknown.

Further, the lower court never entertained the Government's justification for denying to reveal the identity of the informant, other than a general policy basis of the Government's interest in protecting its informant. The Government must state in specific terms what the public interest is. John Marshall Journal of Practice and Procedure, Vol. 9: 221, 224 (1975).

In the United States vs. Fischer 531 F.2d 783 (5th Cir. 1976) the informer arranged the introduction of the Government agent and the Defendants, and the informant conducted one field test. The Court therein concluded that the informer was clearly

more than a mere tipster and that a balancing test required. The record was also silent about the interest of the Government in resisting disclosure and production. The Court believed more information was necessary to conduct a balancing test:

> "Under the circumstances, we feel that an in camera hearing will best accomodate the competing Governmental and individual interests in this case." Id at page 789.

The case was remanded to allow the District Judge to question the informer personally, in camera, to ascertain whether his testimony might be helpful to Defendants' defense.

Even in the Eighth Circuit in United States vs. Weir 575 F.2d 668, 672 -673 (8th

Cir. 1978), the court reviewed the government's file regarding the informant and telephoned the informant to satisfy himself that any information the informant had would not have been relevant or helpful to the defense.

The lower courts continue unchecked in an attempt to conduct a fair balancing test. The in camera hearing, with the informant questioned in person, affords the accused a substantial measure of protection against arbitrary police action. An in camera inspection of the informant's declaration does not. Thus, the issue raised by this conflict is of continuing importance and should be resolved by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted

Respectfully submitted,

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